

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

U.S. SECURITIES AND
EXCHANGE COMMISSION,
)
v.
)
Plaintiff,
)
JOHN J. BRAVATA, RICHARD J.
TRABULSY, ANTONIO
BRAVATA, BBC EQUITIES, LLC
AND BRAVATA FINANCIAL
GROUP, LLC
)
Defendants,
)
and
)
SHARI A. BRAVATA,
)
Relief Defendant
)

**CIVIL ACTION NO.: 2:09-cv-12950-
DML-VMM**

Defendants,

and

SHARI A. BRAVATA,

Relief Defendant.

**MOTION IN LIMINE TO PROTECT
THE ELICITING OF TESTIMONY FROM
RELIEF DEFENDANT, SHARI A. BRAVATA VIOLATIVE
OF APPLICABLE SPOUSAL TESTIMONIAL PRIVILEGES
AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

I. Preliminary Statement and Certification under LR 7.01(A)

"The Securities Regulation Law Firm"

1 On September 9, 2009, the Plaintiff, Securities and Exchange Commission
2 ("SEC") caused to be issued and served a subpoena compelling the testimony of
3 the Relief Defendant, Shari A. Bravata ("Mrs. Bravata") at the evidentiary
4 hearing now scheduled in this cause for October 21-22, 2009. The Bravata
5 Defendants hereby seek an order *in limine* from this Court that precludes the SEC
6 and the Receiver from eliciting testimony or evidence from Mrs. Bravata that
7 would violate either evidentiary privilege commonly available when spouses are
8 compelled to testify in civil proceedings such as in the present case. In complying
9 with the movants' counsel's obligation to confer with opposing counsel pursuant
10 to Local Rule 7.1(A) on this issue, the undersigned counsel does hereby certify
11 that although some general discussions were exchanged between Mr. Polish of
12 the SEC and the undersigned on behalf of the Bravata Defendants, no clear
13 consensus was evident in the exchange of positions between Messrs. Polish and
14 Bartko prior to filing this motion. As a result, it is reasonably likely that the
15 issues presented by this motion will arise during the course of Mrs. Bravata's
16 hearing testimony, making resolution of this evidentiary matter by an order *in*
17 *limine* a far more efficient means of addressing the concerns held by the Bravata
18 Defendants.

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1 The Joint Rule 26(f) Scheduling Conference Report filed in this case on
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3 August 12, 2009, reflects that the SEC intends to call Mrs. Bravata as a witness at
4 the hearing with respect to “[U]ses of investor funds; compliance with injunction
5 and asset freeze; other matters set forth in her declaration.” Mrs. Bravata and the
6 Defendant John J. Bravata (“Mr. Bravata”) have been legally married at all times
7 relevant to the time frame referenced in the SEC Complaint and continue to be
8 married. It is therefore justifiably anticipated by the Bravata Defendants that the
9 SEC or Receiver will seek to elicit testimony from Mrs. Bravata at the hearing
10 that is privileged by application of one or both “spousal privileges” recognized
11 by Federal law. Since Mrs. Bravata has never provided any sworn testimony or
12 other similar form of declaration in connection with the facts of this case, the
13 SEC’s reference to questioning her about other matters set forth in her
14 declaration is also troublesome and could very well lead to the SEC seeking to
15 elicit testimony from Mrs. Bravata otherwise privileged.
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24 *II. Applicable Spousal Privileges*

25 Evidentiary privileges in Federal courts are governed by Federal Rule of
26 Evidence 501, which states:

27 “the privilege of a witness, person, government, State, or political sub-
28 division thereof shall be governed by the principles of the common law as
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1 they may be interpreted by the courts of the United States in the light of
2 reason and experience. However, in civil actions and proceedings, with
3 respect to an element of a claim or defense as to which State law supplies
4 the rule of decision, the privilege of a witness, person, government, State,
5 or political subdivision thereof shall be determined in accordance with
State law."

6
7 As this Court has previously opined in *Bila v. Radio Shack Corporation*, 2004
8 U.S. Dist. LEXIS 24649; 65 Fed. R. Evid. Serv. (Callaghan) 1093, Federal courts
9 have recognized two kinds of evidentiary privileges that apply to the testimony
10 of spouses. The spousal immunity privilege, which exists only during the term of
11 a valid marriage, protects one spouse from being compelled to testify against the
12 other. This privilege belongs only to the testifying spouse and may not be
13 asserted by the opposite spouse. *Trammel v. United States*, 445 U.S. 40, 53, 63 L.
14 Ed. 2d 186, 100 S. Ct. 906 (1980); *United States v. Sims*, 755 F.2d 1239, 1240-41 (6th
15 Cir. 1985). Here, Mrs. Bravata does intend to invoke her spousal immunity
16 privilege when necessary and appropriate at the hearing.

17
18 The second testimonial privilege protects confidential communications
19 made by one spouse to the other during the marriage. It may be asserted by
20 either spouse, and it survives the termination of the marriage. The three
21 elements of this second testimonial privilege are: (1) a marriage recognized as
22 valid by state law at the time of the communication; (2) the expressions must be

1 intended by one spouse to convey a message to the other and (3) the commun-
2 ication must be made in confidence. *See generally* 2 Jack B. Weinstein and
3 Margaret A. Berger, Weinstein's Evidence § 505[4] (1992). The third element-
4 confidentiality - is the essence of most evidentiary privileges, and when
5 confidentiality ceases, the privilege no longer applies.
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8 As will be shown at the hearing on October 21-22, 2009, Mrs. Bravata will
9 not be able to offer any direct, competent testimony concerning the matters
10 asserted in the SEC Complaint or the operations and history of BBC Equities,
11 LLC ("BBC") – other than statements or information shared with her by her
12 husband, Mr. Bravata. Mrs. Bravata is a work at home mother raising two small
13 children and is only marginally involved in household expenses, bills, payments
14 of family obligations and the like. She has no awareness of the intricacies of BBC
15 except what statements may have been told to her by Mr. Bravata, most all of
16 which were shared with her by Mr. Bravata as confidential communications
17 between husband and wife.
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20 On October 9, 2009, Mr. Bravata's counsel conferred with the SEC
21 requesting a stipulation that would make clear before the hearing that no
22 testimony would be elicited from Mrs. Bravata at the hearing that would violate
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any spousal privilege applicable in this Court. The SEC, through Mr. Polish, responded: "We will not elicit testimony from Ms. Bravata regarding communications with her husband. If you would like to effectuate a stipulation along those lines, we are prepared to do so. Otherwise, you should seek whatever relief from the Court that you deem appropriate."¹ Counsel for the Bravata Defendants then sought more clarity from the SEC and requested that the stipulation include the statutory parameters of the provisions of the Michigan statutory spousal privileges codified in MCLA 600.2162 (or the provisions thereof). The SEC then responded with Mr. Polish indicating that, "[T]o the extent you are asking us to stipulate to more than not seeking testimony concerning communications among and between Mr. and Mrs. Bravata, "no."

Consequently, after conferring with the SEC on this issue through an exchange of several email messages, it appears to the Bravata Defendants and Mrs. Bravata in particular, that the only aspect of Mrs. Bravata's anticipated testimony the SEC agrees is off limits is testimony concerning communications between Mr. and Mrs. Bravata. This leaves the door too far open for the SEC to advocate that they are entitled to elicit testimony from Mrs. Bravata otherwise

¹ The SEC's position stated as such is deemed by the Bravata Defendants to be an indication that the relief sought in this motion is opposed by the SEC.

1 covered by one or both of the spousal privileges enunciated in *Bila v. Radio Shack*
2
3 *Corporation, supra.*

4 For example, the scope of the spousal immunity privilege is ordinarily
5 described as a testimonial prohibition available to the testifying spouse that
6 protects one spouse from being compelled to testify against the other. This
7 testimonial privilege is broader in scope than the second confidential marital
8 communications privilege which requires the showing of the three elements cited
9 above. In other words, the SEC should be prohibited from not only eliciting
10 testimony from Mrs. Bravata that would evoke confidential communications
11 between her and her husband, but the spousal immunity privilege protects Mrs.
12 Bravata from being compelled to testify against her husband Mr. Bravata. Based
13 upon the SEC's stated position on this issue, the only limitation it is willing to
14 accede to is that communications exchanged between Mr. and Mrs. Bravata on
15 matters relevant to the subject matter contained in the SEC Complaint are
16 prohibited. Due to this difference of interpretation on the scope of the spousal
17 and confidential communication privileges, an order *in limine* is needed prior to
18
19 Mrs. Bravata's testimony is taken at the evidentiary hearing on October 21-22,
20
21 2009.

1 Summarizing, Mr. and Mrs. Bravata seek an order *in limine* from this Court
2 that clearly outlines the demarcation of the scope of both the spousal immunity
3 privilege available to Mrs. Bravata and the joint marital communications
4 privilege available to both spouses, which order would control the areas of
5 testimony that the SEC or Receiver could elicit from Mrs. Bravata during the
6 coming evidentiary hearing
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10 Dated this 15th day of October, 2009.
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13 Respectfully Submitted,
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16 By: /s/ Gregory Bartko
17 **Law Office of Gregory Bartko, LLC**
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19 Michigan Bar No. P30052
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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JOHN J. BRAVATA, RICHARD J.)
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Defendants,)
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SHARI A. BRAVATA,)
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Relief)
)
Defendant.)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION IN
LIMINE TO PROTECT THE ELICITING OF TESTIMONY FROM RELIEF
DEFENDANT, SHARI A. BRAVATA VIOLATIVE OF APPLICABLE SPOUSAL

"The Securities Regulation Law Firm"

1 TESTIMONIAL PRIVILEGES AND MEMORANDUM OF LAW IN SUPPORT
2
3 THEREOF was filed electronically this 15th day of October, 2009 with the Clerk of
4 the Court using CM/ECF. I also certify that the foregoing document is being
5 served this day on all counsel of record and any *pro se* parties identified on the
6 attached Service List via e-mail and U.S. mail, either via transmission of Notices
7 of Electronic Filing generated by CM/ECF or via U.S. mail to those parties that
8 have formally appeared of record but are who are not authorized to receive
9 electronic Notices of Electronic Filing.

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14 Respectfully Submitted,
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